



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 219 and 252**

**[Docket DARS-2019-0015]**

**RIN 0750-AK39**

**Defense Federal Acquisition Regulation Supplement:**

**Nonmanufacturer Rule for 8(a) Participants (DFARS Case 2019-D004)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the final rule published by the Small Business Administration implementing a section of the National Defense Authorization Act for Fiscal Year 2013 that provided revised and standardized limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns, including participants in the 8(a) Program.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2019-D004, using any of the following methods:

- o *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for "DFARS Case 2019-D004." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2019-D004" on any attached documents.

- o *Email:* [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2019-D004 in the subject line of the message.

- o *Fax:* 571-372-6094.

- o *Mail:* Defense Acquisition Regulations System, Attn: Jennifer D. Johnson, OUSD(A-S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov), approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Jennifer D. Johnson, telephone 571-372-6100.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is proposing to revise the DFARS to implement regulatory changes made by the Small Business Administration (SBA) in its

final rule published in the *Federal Register* at 81 FR 34243 on May 31, 2016. SBA's final rule implemented the requirements of section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, 15 U.S.C. 657s). Section 1651 revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns, including 8(a) Program participants, under procurements conducted pursuant to Federal Acquisition Regulation (FAR) part 19, Small Business Programs.

Small business concerns must meet certain requirements when they offer to the Government an end item they did not manufacture, process, or produce. These requirements are known as the nonmanufacturer rule. For example, a small business nonmanufacturer must offer an end item that a small business manufactured, processed, or produced in the United States or its outlying areas (as defined in FAR 2.101). The clause at DFARS 252.219-7010, Notification of Competition Limited to Eligible 8(a) Concerns-Partnership Agreement, includes an outdated version of these requirements. This rule proposes to update DFARS 252.219-7010 to include the revised nonmanufacturer rule provided by section 1651 and implemented in SBA's final rule.

## **II. Discussion and Analysis**

This rule proposes to amend DFARS 252.219-7010, paragraph (d), to replace the outdated text regarding the nonmanufacturer rule

with updated text that implements section 1651 and SBA's final rule. The proposed, updated text is consistent with the proposed FAR rule published in the *Federal Register* on December 4, 2018, at 83 FR 62540 (FAR Case 2016-011, Revision of Limitations on Subcontracting). In addition, this rule proposes to revise the title of the clause at 252.219-7010 to align with the title of FAR 52.219-18, Notification of Competition Limited to Eligible 8(a) Participants.

### **III. Expected Impact of the Proposed Rule**

The clause at DFARS 252.219-7010, Notification of Competition Limited to Eligible 8(a) Concerns-Partnership Agreement, currently requires 8(a) participants that offer end items they did not manufacture or produce (i.e., nonmanufacturers) to offer end items manufactured or produced by small business concerns in the United States or its outlying areas. This requirement is known as the "nonmanufacturer rule." DFARS 252.219-7010 provides an exemption from the nonmanufacturer rule for contracts valued at or below \$25,000 and awarded under simplified acquisition procedures. For these contracts, an 8(a) participant currently may offer end items manufactured or produced by any domestic firm.

SBA's final rule applied the nonmanufacturer rule to 8(a) contracts at any dollar value. There was no exemption for contracts valued at or below \$25,000 and awarded under

simplified acquisition procedures. Therefore, this rule proposes to remove that exemption from DFARS 252.219-7010. This change means the nonmanufacturer rule will apply to 8(a) contracts at any dollar value, and 8(a) participants that are nonmanufacturers will be required to offer end items manufactured, processed, or produced by small business concerns in the United States or its outlying areas.

To estimate the number of 8(a) participants that may be impacted by this change, DoD obtained data from the Federal Procurement Data System on DoD contracts, for products, awarded to 8(a) participants under the 8(a) Program. Contracts for services, including construction, were excluded because the nonmanufacturer rule only applies to products, not services. In FY 2016 through FY 2018, DoD awarded contracts for products to an average of 285 8(a) participants each year. An average of 90 of those 8(a) participants per year were awarded approximately 2 contracts each that were valued at or below \$25,000, using simplified acquisition procedures. Therefore, DoD estimates that approximately 90 participants may be impacted by this rule. Due to the small number of 8(a) participants that may be impacted, it is expected that the cost associated with this rule will be de minimis.

#### **IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

DoD intends to apply the requirements of section 1651 of the NDAA for FY 2013 to contracts at or below the simplified acquisition threshold and to contracts for the acquisition of commercial items, including commercially available off-the-shelf items.

##### **A. Applicability to Contracts at or Below the Simplified Acquisition Threshold**

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

Therefore, given that SBA applied section 1651 to contracts and subcontracts at or below the SAT and that nearly 76 percent of the DoD contracts awarded to 8(a) participants in recent years are at or below the SAT, DoD has determined that it is in the best interest of the Federal Government to apply section 1651 to contracts or subcontracts at or below the SAT. An exemption for contracts or subcontracts at or below the SAT would exclude contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

10 U.S.C. 2375 governs the applicability of laws to contracts for the acquisition of commercial items, including COTS items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense (Acquisition and Sustainment) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, including COTS items, then the provision of law will apply to contracts for the acquisition of commercial items. This authority has been delegated to the Principal Director, DPC.

Therefore, given that SBA applied section 1651 to contracts for the acquisition of commercial items, including COTS items, and that approximately 72 percent of the DoD contracts awarded to 8(a) participants in recent years are for commercial items, including COTS items, DoD intends to determine that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items, including COTS items, would exclude the contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

#### **V. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated



September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **VI. Executive Order 13771**

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

#### **VII. Regulatory Flexibility Act**

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because it will impact a very small number of small entities. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to revise the DFARS to implement regulatory changes made by SBA in its final rule published in the *Federal Register* on May 31, 2016 (81 FR 34243), which implemented section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239; 15 U.S.C. 657s). Section 1651 revised and standardized the limitations on subcontracting and the nonmanufacturer rule that apply to small business concerns, including 8(a) Program participants, under procurements conducted pursuant to FAR part 19, Small Business Programs.

The objective of the rule is to implement the revised nonmanufacturer rule for 8(a) Program participants by updating the clause at DFARS 252.219-7010, Notification of Competition Limited Eligible 8(a) Concerns-Partnership Agreement. The legal basis is section 1651 of the NDAA for FY 2013.

This rule will apply to 8(a) participants that contract with DoD. According to data obtained from the Federal Procurement Data System, DoD awarded contracts for products (i.e., contracts to which the nonmanufacturer rule would apply) to an average of 285 8(a) participants each year during FY 2016 through FY 2018. These entities will need to familiarize themselves with this rule. The clause at DFARS 252.219-7010 currently provides an exemption from the nonmanufacturer rule for contracts valued at or below \$25,000 and awarded under simplified acquisition procedures. SBA's final rule applied the nonmanufacturer rule to 8(a) contracts at any dollar value, with no exemption for contracts at or below \$25,000. DoD awarded contracts at or below \$25,000 to an average of 90 8(a) participants each year during FY 2016 through FY 2018.

This rule does not impose any new reporting, recordkeeping or other compliance requirements for small entities.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives which would accomplish the stated objectives of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2019-D004), in correspondence.

#### **VIII. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Parts 219 and 252**

Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 2019 and 252 are proposed to be amended as follows:

1. The authority citation for parts 219 and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

**PART 219—SMALL BUSINESS PROGRAMS**

\* \* \* \* \*

**219.811-3 [Amended]**

2. Amend section 219.811-3 by removing "Eligible 8(a) Concerns" and adding "Eligible 8(a) Participants" in two places.

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

3. Amend section 252.219-7010—

a. In the section heading, by removing "Eligible 8(a) Concerns" and adding "Eligible 8(a) Participants" in its place;

b. In the clause heading, by removing "Eligible 8(a) Concerns" and adding "Eligible 8(a) Participants" in its place, and removing "(MAR 2016)" and adding "(DATE)" in its place;

c. In the paragraph (a) introductory text, by removing "in the SBA's" and adding "in SBA's" in its place;

d. In paragraph (a)(2), by removing "by the SBA" and adding "by SBA" in its place;

e. By redesignating paragraph (d)(2) as paragraph (e); and

f. By revising paragraph (d).

The revision reads as follows:

**252.219-7010 Notification of Competition Limited to Eligible 8(a) Concerns—Partnership Agreement**

\* \* \* \* \*

(d)(1) Unless SBA has waived the requirements of paragraphs (d)(1)(i) through (iii) and (d)(2) of this clause in accordance with 13 CFR 121.1204, a small business concern that provides an end item it did not manufacture, process, or produce, shall—

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas; for kit assemblers, see paragraph (d)(2) of this clause instead;

(ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

(iii) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

(2) When the end item being acquired is a kit of supplies, at least 50 percent of the total cost of the components of the kit shall be manufactured, processed, or produced by small businesses in the United States or its outlying areas.

(3) The requirements of paragraphs (d)(1)(i) through (iii) and (d)(2) of this clause do not apply to construction or service contracts.

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